## CP-27 Commission Position on the Performance of Residential Leasing and Property Management Functions (Adopted August 1998 – Revised August 2013)

Property management is one of the leading sources of complaints received by the Commission. This position statement is designed to identify common issues found during the course of a complaint investigation or an audit; however it does not encompass all of the potential issues associated with property management. Any licensed real estate broker ("Broker") interested in performing property management duties are strongly encouraged to complete educational offerings specific to property management, train with a Broker experienced in property management, and develop a strong familiarity with the Colorado Real Estate Manual chapters titled Escrow Records, and Property Management and Leases.

### License Requirements

Pursuant to C.R.S. §12-61-101(2)(a)&(b), the leasing and subsequent management of real estate for a fee or compensation, is included among the activities for which a license is required. As a result of the complaints received and issues identified in Commission investigations and audits, the Commission considers property management to be a complex area of practice. C.R.S. §12-61-113(1)(n) requires that a Broker be competent and worthy in the performance of their duties so as to not endanger the interest of the public. Furthermore, it is the Commission's position that prior to performing any acts that require a Broker's license, a Broker should determine whether he or she possesses the knowledge, experience and/or training necessary to perform the terms of the transaction and to maintain compliance with the applicable federal, state or local laws, rules, regulations, or ordinances. If the Broker does not have the requisite knowledge, experience and/or training necessary to fulfill the terms of the agreement, the Broker should either decline to provide brokerage services or seek the assistance of another Broker who does have the necessary experience, training and/or knowledge. A Broker who agrees to lease property, or perform ongoing property management duties, needs to ensure that he or she is competent to perform the duties he or she agrees to undertake and must have permission from the Broker's employing broker. Similarly, the employing broker has the responsibility to ensure that he or she is competent to supervise a broker that performs leasing or property management duties.

### Leasing v. Property Management

While leasing and property management are similar, they are two distinctively different services. Leasing is a onetime activity in which the broker acts as a special agent, while property management is an ongoing relationship in which the broker is a general agent. If a Broker is performing leasing, the Broker may list a property for lease, advertise the property, help screen tenants and/or help negotiate a lease. Once the lease is signed by the landlord and tenant, the Broker's duty to the landlord or tenant is complete. With property management, a broker's obligations continue beyond the formation of the lease. A Broker performing property management duties may also perform leasing duties; where a Broker only performing leasing duties is not performing property management duties.

Generally, a Broker will function in one of three capacities with regards to rental properties. The Broker may provide leasing services only for a landlord, where the broker is involved in procuring a tenant and negotiating the lease terms. Alternatively, the broker may provide leasing services on behalf of the tenant in locating a suitable rental property and negotiating a lease. In the first two scenarios, the Broker's duties are fulfilled once the lease is executed and the broker is not involved in the transaction any further. In the third scenario, the Broker agrees not only to

provide leasing services, but is also responsible for one or more of the following: maintaining the property's physical condition, communicating with tenants, collecting rent and/or collecting security deposits. In this scenario, the Broker's duties are ongoing; therefore the Broker is conducting property management services. Regardless of whether the Broker is working with the landlord or the tenant, the Broker must establish clear expectations regarding the services the Broker agrees to provide and communicate these expectations to the consumer.

**Supervision**

Before engaging in property management or leasing, the Broker should discuss with the employing broker whether the Broker is capable of and allowed to perform property management or leasing duties. The employing broker is responsible for maintaining all trust accounts and all transaction records, and the employing broker is responsible for exercising authority, direction and control over the Broker's conformance to statutes and Commission rules (Rules E-29 and E-30). This includes reviewing all contracts to ensure competent preparation and reviewing all transaction files to ensure that required documents exist (Rule E-31). If the employing broker does not allow Brokers to perform leasing and/or property management duties, the Broker needs to refrain from leasing and/or property management activities or seek employment elsewhere. If the real estate brokerage firm does allow leasing and/or property management, regardless of how minor, the employing broker must ensure that the office policy manual addresses these activities, including management of the Broker's own property. Both the Broker and the employing broker need to be aware of state and local laws that impact the performance of property management duties, which include, but are not limited to, laws pertaining to security deposits, habitability, carbon monoxide alarms, asbestos, lead-based paint, handling of confidential information, zoning and agency.

**Forms**

C.R.S. §12-61-803(4) indicates that a Broker may complete standard forms including those promulgated by the Commission. Forms that are not promulgated by the Commission must be drafted by an attorney. When the Broker provides leasing services for a tenant, the Broker should complete the Exclusive Tenant Listing Contract. When the Broker provides ONLY leasing services for the landlord, the Broker should complete the Commission-approved Exclusive Right to Lease Listing Contract. If the Broker also will be providing property management services in addition to leasing services for the landlord, a Broker should use the Brokerage Duties Addendum to Property Management Agreement with a property management agreement drafted by an attorney. Under Rule E-4, the Broker must provide a copy of any executed contracts to the consumer. While not all property managers provide a physical copy of the lease to the landlord, because sometimes it is executed by the Broker on behalf of the landlord, the Broker should make the document available to the landlord upon request.

If the Broker is going to provide property management services, the Broker needs to provide a property management agreement. The property management agreement must be drafted by an attorney. The property management agreement should outline the duties and responsibilities of both parties. The property management agreement should, at the very minimum, address:

- Duration of the relationship;
- The parties;
- Identify the property to be managed;
- General duties performed by the Broker, including the signing of leases.

- Fees for the manager's services, including disclosure of any mark-ups (Commission Rule E-1 (p)(8)). Before a mark-up can be charged, the Broker must obtain prior written consent to assess and receive mark-ups and/or other compensation for services performed by any third party or affiliated business entity;
- Tenant selection criteria. If the decision to lease will be based on criminal history or financial worthiness, the property management agreement should indicate who is responsible for collecting this data and what sources will be used. Additionally, the Broker must ensure compliance with the Fair Housing and Fair Credit Acts.
- Posting of eviction notices. If a Forcible Entry and Detainer (a/k/a eviction) is necessary, an attorney should represent the landlord in the filing of the Forcible Entry and Detainer. A Broker that files a Forcible Entry and Detainer without the assistance of an attorney may be practicing law without a license;
- Ownership Interest. The Broker must disclose a Broker's direct or indirect ownership interest in any company which will be providing maintenance or other services to the landlord, and any other conflicts of interest (Rule E-25);
- Identity of the entity responsible for holding the security deposit, and if interest is earned on security deposit escrow accounts, who benefits from such interest and consent to transfer the interest to the beneficiary;
- Process to be followed for any subsequent transfer of the landlord's monies, security deposits, keys and documents (Rule E-l6); and,
- Requirement that the landlord receive regular monthly accounting of all funds received and disbursed.

While these general duties should be addressed in the property management agreement, it is not an all inclusive list of all the duties that may be performed by a property manager or that should be addressed within the property management agreement. Brokers are encouraged to pay close attention not only to Commission rules and regulations, but also the "Property Management and Leases" chapter in the Colorado Real Estate Manual.

Regardless of whether the Broker is acting as a leasing agent or a property manager, prior to engaging in any of the activities that require a real estate broker's license, the Broker is required to disclose in writing the different brokerage relationships that are available to the tenant (Rule E-35). The Commission-approved Brokerage Disclosure to Tenant form should be used to disclose the brokerage relationships available.

In Colorado there is not an approved lease form. Therefore, prior to a tenant being procured, the Broker must: 1) hire an attorney to draft a lease form for the Broker to use; or 2) the landlord will need to designate a lease. The terms of the lease need to be clear and in writing. A Broker may choose to limit which lease is used to only the lease form provided by their attorney so long as the landlord authorizes the Broker to use their attorney prepared lease form in the property management agreement.

## Trust Accounts and Record Keeping

Any Broker performing property management duties in which the Broker is responsible for the collection and distribution of rent or security deposits needs to be especially cognizant of the Commission rules and regulations pertaining to the management of funds of others and records retention. Brokers should pay close attention to the chapters titled "Escrow Records" and

"Property Management and Leases" in the Colorado Real Estate Manual. C.R.S §12-61-113(1)(g) requires that a Broker account for and remit, within a reasonable time, any moneys coming into the Broker's possession that belong to others. Rule E-1(g) defines money belonging to others as including, but not limited to, funds received by a Broker in connection with property management agreements, rent or lease contracts, and money belonging to others that is collected for future investment or other purposes. All money belonging to others which is received by a Broker acting as a property manager must be deposited in the Broker's escrow or trust account within five (5) business days of receipt (Rule E-1(n)).

If a Broker is going to deposit rent or security deposits into the employing broker's trust account(s), the Broker is required to keep records relative to these monies. Rule E-1 requires that all money belonging to others that is accepted by Broker be deposited in one or more accounts separate from money belonging to the Broker, employing broker or brokerage entity. Separate trust accounts must be maintained in the name of the employing broker, or the employing broker and the licensed business entity, and the maintenance of the separate accounts is the responsibility of the employing broker (Rule E-1(a) and (c)). This includes rent checks. A Broker who manages fewer than seven residences may deposit rental receipts and security deposits, and disburse money for such purposes, in the "sales escrow" account (Rule E-1(i)), although this is not recommended. A better practice is to maintain separate accounts for property management. At a minimum, a Broker is recommended to have two trust accounts for property management; one for security deposits and one for operating trust monies. As an alternative to trust accounts, a Broker may deposit rent monies or security deposits directly into an account owned and controlled by the landlord.

Rule E-16 prohibits a Broker who receipts for security deposits from delivering such deposits to a landlord, unless the tenant's written authorization is given in the lease or written notice is given to the tenant by first-class mail. The notice must identify who is holding the security deposit and the procedure the tenant must follow to request the return of the deposit. If the security deposit is held by or transferred to the landlord, the property management agreement must specify that the landlord is responsible for the security deposit's return and that, in the event of a dispute, the Broker is authorized to reveal the true name and current mailing address of the landlord. The Broker may not use any portion of the security deposit for the Broker's benefit.

Pursuant to Rule E-1(p), a Broker is required to supervise and maintain a record keeping system, at the Broker's licensed place of business that consists of an "escrow or trust account journal", a "ledger" and a "bank reconciliation worksheet". The Broker must also maintain supporting records that detail all cash received and disbursed under the terms of the management and rental agreements. If a Broker has deposited personal funds into the trust account to open and maintain the trust account, the journal and "broker's ledger record" must contain entries documenting this money. The Broker's personal funds must also be included in the bank reconciliation worksheet. All deposits of funds into an escrow or trust account must be documented, as must all disbursements of funds from an escrow or trust account.

Absent a written agreement that indicates otherwise, the "cash basis" of accounting is required for maintaining all required escrow or trust accounts and records. Funds from one owner cannot be used to supplement operating capital, or to finance expenditures of other owners or the Broker (C.R.S. §§12-61-113(1)(g) and (g.5) and Rules E-1(f), (g), (p), and (q), E-29 and E-30). The Broker is required to retain accurate, on-going records which verify disclosure of and consent to any mark-ups assessed or received, and fully account for the amounts or percentage of

compensation assessed or received (Rule E-1(p)(8)). For Commission purposes, brokers may maintain their records in electronic format as long as the records are stored in a format that can be continually retrieved and legibly printed (Rule E-6). C.R.S. §12-61-113(1)(i) requires Brokers to maintain possession of their records for four (4) years.

**Security Deposits**

Brokers have to be very careful how they handle security deposits. The security deposit law is complicated and legal assistance is advisable. Wrongful withholding of a security deposit may result in the landlord, and the Broker as the landlord's agent, being liable for treble the amount wrongfully withheld, plus reasonable attorneys' fees and court costs. C.R.S. §38-12-103 requires that the security deposit be returned to the tenant within one month after a lease is terminated or the premises have been vacated and accepted, whichever occurs last. The lease may indicate a longer period of time to return the security deposit to the tenant; however state law does not allow this extension of time to exceed sixty days. Security deposits cannot be retained to cover normal wear and tear. C.R.S. §38-12-102 defines normal wear and tear as:

> "deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests."

Normal wear and tear is at the core of most security deposits lawsuits. Security deposits may be retained for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repairs or cleaning contracted for by the tenant in the lease. If there is cause to retain any portion of the security deposit, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained. The statement must be delivered with the difference between the amount of the security deposit and the amount retained. The Broker or the landlord is deemed to have complied with this requirement by mailing the statement and payment to the tenant's last known address. If the Broker or the landlord fails to provide the statement to the tenant within 30 days (or the alternative deadline specified in the lease) of the lease terminating or the surrender and acceptance of the premises, whichever occurs last, the landlord or the Broker may forfeit his right to retain any portion of the security deposit to offset amounts owed. The landlord does not lose the right to pursue amounts due, they just lose the right to utilize the security deposit to offset amounts owed. Furthermore, if the tenant pursues court action regarding any portion of the security deposit being retained, the landlord or the Broker bears the burden to prove that retention of any portion of the security deposit was not wrongful.

In the rare event that a lease is nullified and voided due to the landlord's failure to repair a hazardous condition attributed to a gas appliance, piping, or other gas equipment, the landlord or the Broker must deliver all, or the appropriate portion of, the security deposit plus any rent rebate owed to the tenant for the time period that the tenant vacated the premises. Payment must be made to the tenant within 72 hours of the tenant vacating the premises. If the 72$^{nd}$ hour falls on a Saturday, Sunday, or legal holiday, the security deposit, and any rent rebate due, must be delivered to the tenant by noon on the next day that is not a Saturday, Sunday, or legal holiday. If a portion of the security deposit is retained, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained and payment of the remaining balance of the security deposit. If the tenant does not receive all or a portion of the security deposit with the statement within the required deadlines, the tenant may be entitled to three times the amount of the security deposit and reasonable attorney fees (C.R.S. §38-12-104).

**Transfer of Services**

If a Broker no longer will be managing a property, the Broker must transfer a copy of the entire file to the landlord or, upon written authorization from the landlord, to the new Broker engaged to perform the property management. At a minimum, the entire file should include:

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| (a) | Copy of existing lease | (d) | Outstanding tenant balances |
| (b) | Copy of check-in condition report | (e) | Tenant(s) security deposit(s) |
| (c) | Keys | (f) | Owner's funds (subject to outstanding obligations) |

Although the Commission rules do not specifically address the transfer of management duties, there should be no delay in transferring the tenant's security deposit to either the landlord or the new Broker. The Broker must give written notice by first class mail to the tenant that the security deposit has been transferred to the landlord or new Broker along with the landlord's or new Broker's contact information. The notice must indicate who is holding the security deposit and the specific requirements for the procedure in which the tenant may request return of the deposit [reference Rule E-16 and C.R.S. §38-12-103(4)]. Timely transfer of the deposit protects the Broker from getting caught between the landlord and the tenant regarding the accounting of the deposit. The Broker must also provide the landlord with a final accounting of all trust funds held by the Broker. Although the Broker may delay the transfer of the landlord's funds until all outstanding invoices or debts have been resolved, the transfer of the landlord's funds needs to occur within a reasonable amount of time. A Broker that fails to transfer funds in a reasonable amount of time may be subject to discipline by the Commission for unworthiness or incompetency, C.R.S. §12-61-113(1)(n).

**Managing Broker's Own Property**

Brokers are subject to the license law and Commission rules when they participate in real estate matters as principals, including managing the Broker's own property. See Seibel v. Colorado Real Estate Commission, 34 Colo. App. 415, 530 P.2d 1290 (1974). A Broker who manages his or her own rental property needs to disclose known conflicts of interest and that the Broker possesses a Colorado real estate broker's license (Rule E-25). The Broker also needs to use a lease drafted by an attorney for the transaction, along with disclosing in writing to the tenant the brokerage relationships under Colorado law (Rule E-35).

If the Broker has an employing broker, it is important for the Broker to consult with the employing broker regarding the brokerage firm's requirements or limitations regarding managing a Broker's own property. When a Broker personally receipts for a security deposit on his or her own property, the license law does not require that the security deposit be placed in an escrow account. Additionally, a Broker cannot deposit rental proceeds into the brokerage firm's escrow account(s) for properties owned by the Broker [Rule E-1(f)].